U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 7302902

Date: AUG. 25, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien of Exceptional Ability

The Petitioner, a designer and manufacturer of medical devices, seeks to employ the Beneficiary as an "R&D Staff Engineer - Mechanical."[1] The company requests his classification under the employment-based, second-preference, immigrant visa category ("EB-2") for noncitizens of exceptional ability in the sciences, arts, or business. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Nebraska Service Center denied the petition. The Director concluded that, contrary to a requirement of the requested immigrant visa category, the accompanying certification from the U.S. Department of Labor (DOL) didn't demonstrate the offered position's need for a noncitizen of exceptional ability.[2]

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (citations omitted) (discussing the standard of proof). Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a noncitizen of exceptional ability generally follows a three-step process. First, a prospective employer must apply to DOL for certification that: (1) there are insufficient U.S. workers

[1] "R&D" appears to stand for research and development.

[2] Initially, the Director ruled that the Petitioner did not demonstrate the position's need for a member of the professions holding an advanced degree. The requested, second-preference category authorizes immigrant visas for both noncitizens of exceptional ability and advanced degree professionals. Section 203(b)(2)(A) of the Act. After realizing that the Petitioner requested the Beneficiary's classification as a noncitizen of exceptional ability rather than as an advanced degree professional, the Director reopened the proceedings on his own motion and simultaneously issued a new decision regarding the specified visa subcategory. Because the new decision does not favor the Petitioner, the Director should have afforded the company at least 30 days from the motion's service to submit a written brief or to waive the 30-day period. 8 C.F.R. § 103.5(a)(5)(ii). On appeal, however, the Petitioner does not allege that the procedural omission prejudiced the company. We therefore will not remand the matter on this ground. *See Al-Ghorbani v. Holder*, 585 F.3d 980, 992 (6th Cir. 2009) (requiring a party in immigration proceedings to show prejudice to prevail on a due process claim); *see also Bangura v. Hanson*, 434 F.3d 487, 496 (6th Cir. 2006) (explaining that the Court has not decided whether procedural due process rights derive from an immigrant visa petition).

able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position won't harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

Finally, if USCIS approves a petition, a designated noncitizen may apply for an immigrant visa abroad or, if eligible, "adjustment of status" in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. EXCEPTIONAL ABILITY

Noncitizens of exceptional ability are eligible immigrants who, "because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." Section 203(b)(2)(A) of the Act. The term "exceptional ability in the sciences, arts, or business" means "a degree of expertise significantly above that ordinarily encountered" in those fields. 8 C.F.R. § 204.5(k)(2).

Demonstration of exceptional ability requires more than submission of a professional or academic credential, or a license or certificate to practice a profession or occupation. Section 203(b)(2)(C) of the Act. Rather, a petitioner must submit at least three of the following six types of evidence:

> (A) An official academic record showing that the noncitizen has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
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> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the noncitizen has at least ten years of full-time experience in the occupation for which he or she is being sought;
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> (C) A license to practice the profession or certification for a particular profession or occupation;
>
> (D) Evidence that the noncitizen has commanded a salary, or other renumeration for services, demonstrating exceptional ability;
>
> (E) Evidence of membership in professional associations; or
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professionals or business organizations.

8 C.F.R. §§ 204.5(k)(3)(ii)(A-F). If these categories "do not readily apply" to a beneficiary's occupation, a petitioner may submit "comparable evidence to establish the beneficiary's eligibility." 8 C.F.R. § 204.5(k)(3)(iii).

Also, the job-offer portion of a labor certification accompanying an exceptional ability petition "must demonstrate that the job requires . . . an alien of exceptional ability." 8 C.F.R. § 204.5(k)(4)(i). In considering the job-offer portion of a certification, USCIS may neither ignore a term, nor impose additional requirements. *See, e.g., Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis added).

The accompanying labor certification states the minimum requirements of the offered position of R&D staff engineer - mechanical as a U.S. bachelor's degree, or a foreign equivalent degree, in mechanical engineering or a related field of study, plus four years of experience in the job offered or "related design experience." The labor certification also states the Petitioner's acceptance of alternate combinations of education and experience. Part H.8 of the certification states the company's acceptance of a doctorate degree with no experience. Part H.14 lists a third alternate requirement: a master's degree with two years of experience.

As the Director found, the job-offer portion of the labor certification does not demonstrate the position's need for a noncitizen of exceptional ability. The labor certification indicates the job's need for a degree in mechanical engineering, meeting an evidentiary requirement for exceptional ability at 8 C.F.R. § 204.5(k)(3)(ii)(A). But none of the additional job requirements listed on the labor certification satisfy any of the remaining five acceptable types of evidence listed in the regulations. *See* 8 C.F.R. §§ 204.5(k)(3)(ii)(B)-(F). Contrary to 8 C.F.R. § 204.5(k)(3)(ii)(B), the labor certification states the position's need for less than 10 years of experience. The certification also does not indicate the job's need for a license or certification, membership in a professional association, or achievements or significant contributions to the industry or field. *See* 8 C.F.R. §§ 204.5(k)(3)(ii)(C), (E), (F). In addition, the record does not demonstrate that the position's annual proffered wage of $85,426 reflects a need for exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(D). Thus, the record does not establish that the offered position requires "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." *See* 8 C.F.R. § 204.5(k)(2) (defining the term "exceptional ability in the sciences, arts, and business"). Therefore, contrary to 8 C.F.R. § 204.5(k)(4)(i), the labor certification does not demonstrate the offered position's need for a noncitizen of exceptional ability.

On appeal, the Petitioner argues that the regulation requiring a labor certification to demonstrate a job's need for exceptional ability conflicts with DOL labor certification rules and frustrates Congress's intent to make immigrant visas available for noncitizens of exceptional ability. The record, however, lacks sufficient evidence to demonstrate the offered position's need for a noncitizen of exceptional ability.

Although an administrative agency must generally follow the plain language of its regulations, an agency's rule cannot interfere with Congress' stated or intended purposes. *See, Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842–43 (1984); *Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 474 (6th Cir. 2008). Congress intended to make immigrant visas available to noncitizens of exceptional ability. Section 203(b)(2)(A) of the Act. The Petitioner, however, argues that, by requiring job-offer portions of labor certifications for these beneficiaries to require exceptional ability, the regulation at 8 C.F.R. § 204.5(k)(4)(i) frustrates Congress's intent.

DOL designed its regulations to prevent certifications of offered positions requiring exceptional abilities. DOL regulations seek to bar labor certification employers from "tailoring" job requirements to individual qualifications of noncitizens, stating that the job requirements "must be those normally required for the occupation." 20 C.F.R. § 656.17(h)(1); *see also Matter of Dhanasar*, 26 I&N Dec.

884, 885 (AAO 2016) (explaining that a labor certification employer "may not tailor the position requirements to the foreign worker's qualifications; it may only list the position's minimum requirements, regardless of the foreign worker's additional skills that go beyond what is normally required for the occupation"). Job requirements on a labor certification can exceed the minimums "normally required" for offered occupations. To do so, however, employers must document that such, excessive requirements arise from "business necessity," meaning that they "bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform the job in a reasonable manner." *Id.* The Petitioner argues that these inherent, regulatory obstacles in the labor certification process "could not have been the legislative intent for the [exceptional ability] classification."

Congress, however, is presumed to know existing law when it passes legislation. *See, e.g., Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169-70 (2014). At the time Congress created the EB-2 category in 1990, labor certifications were subject to the same limitations on job requirements as now. DOL regulations and case law required job requirements, unless arising from business necessity, to reflect the normal, minimum requirements of their respective occupations. *See* 20 C.F.R. § 656.21(b)(2)(1989); *see also Matter of Information Inds., Inc.*, 1988-INA-82 (BALCA Feb. 9, 1989) (*en banc*) (setting the standard of proof for demonstrating business necessity).

Also, in the same act that created the EB-2 category, Congress specified that EB-2 petitioners must obtain labor certifications. Congress stated that "[t]he grounds of inadmissibility of aliens under subparagraph (A) . . . [of section 212(a)(5) of the Act] shall apply to immigrants seeking admission or adjustment of status under paragraph (2) . . . of section 203(b)." Section 212(a)(5)(D) of the Act.[3] In addition, the precursor to the requested classification - the third-preference category for noncitizens of exceptional ability in the sciences or arts under former section 203(a)(3) of the Act - required petitions to include labor certifications. *See* former section 212(a)(14) of the Act.

Thus, the Act and its legislative history indicate that Congress, despite knowing the regulatory obstacles that prospective employers of noncitizens of exceptional ability would face in labor certification proceedings, generally intended the employers to obtain DOL certifications of their offered positions. The Petitioner's argument therefore does not persuade us that 8 C.F.R. § 204.5(k)(4)(i) frustrates Congressional intent.

III. CONCLUSION

The Petitioner has not established the labor certification's demonstration of the offered position's need for a noncitizen of exceptional ability. The Petitioner bears the burden of establishing eligibility for the benefit sought. Section 291 of the Act. The Petitioner has not met that burden. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.

[3] Congress granted an exception to the EB-2, labor-certification requirement, allowing the requirement's "waiver" if deemed to be "in the national interest." *See* section 203(b)(2)(B) of the Act. The Petitioner, however, does not request a national-interest waiver. *See Matter of Dhanasar*, 26 I&N Dec. at 889-91 (discussing the requirements to obtain a national interest waiver).